

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**MASTEC NORTH AMERICA, INC., d/b/a  
MASTEC ADVANCED TECHNOLOGIES**

**and**

**Case Nos. 12-CA-27071  
12-CA-62983**

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,  
LOCAL UNION NO. 728, AFL-CIO**

*Shelley Plass, Esq. and Marinelly Maldonado, Esq.*, Counsel for the General Counsel.  
*D. Marcus Braswell, Jr., Esq., Sugarman & Susskind, P.A.*, Counsel for Charging Party.  
*Michael Casey, Esq., Duane Morris, LLP*, Counsel for the Respondent.

**DECISION**

**Statement of the Case**

**Joel P. Biblowitz, Administrative Law Judge:** This case was heard by me on May 21, 22 and 23, 2012 in Miami, Florida. The Consolidated Complaint herein, which issued on January 31, 2012 and was based upon unfair labor practice charges and amended charges that were filed by International Brotherhood of Electrical Workers, Local Union No. 728, AFL-CIO, herein called the Union, between March 16, 2011<sup>1</sup> and January 6, 2012, alleges numerous violations of Section 8(a)(1)(3) and (5) of the Act by Mastec North America, Inc., d/b/a Mastec Advanced Technologies, herein called Respondent. It is alleged that Respondent, by Jeff Muoio, its regional vice president, and Helbert Villa, its regional director of operations, and admitted supervisors and agents, on February 14 or 15, threatened employees with a reduction of their pay and benefits because of Union representation. It is also alleged that Villa, in mid February, threatened employees with the withholding of benefits because they were represented by the Union, and in March or April created the impression among its employees that their Union activities were under surveillance by the Respondent, and impliedly promised employees improvements in pay and benefits for abandoning their support for the Union. It is further alleged that on about February 16 and 17 Respondent, by Dwight McKenzie, a regional operations trainer for the Respondent, and an alleged Section 2(13) agent, by telephone, threatened employees that their pay would be reduced because of Union representation, solicited employees to eliminate the Union as their representative, impliedly promised them improved pay and benefits if they did so, and interrogated employees about their Union activities and sympathies, as well as the Union activities and sympathies of other employees.

It is next alleged that Glenn Anderson, Respondent's site manager and admitted supervisor, in March or April, promised employees increased pay and work opportunities for abandoning their support for the Union. It is further alleged that on about February 19 Respondent transferred employees from its Boca Raton facility to its Riviera Beach facility, reduced the pay and benefits of its employees who transferred from Boca Raton to Riviera Beach, and granted pay increases and benefits to its unrepresented employees, including pay and benefit improvements that were promised to Boca Raton facility employees before they

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<sup>1</sup> Unless indicated otherwise, all dates referred to herein relate to 2011.

transferred to positions in the unit at the Riviera Beach facility, while withholding these benefits from the unit employees. These actions are alleged to violate Section 8(a)(1)(3) and (5) of the Act. Finally, it is alleged that Respondent violated Section 8(a)(1)(3)&(5) of the Act by withdrawing recognition from the Union based upon a petition of the employees that was allegedly tainted by the above mention unfair labor practices.

## I. Jurisdiction and Labor Organization Status

The Complaint alleges, and I find, that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

## II. The Facts

### A. Background

Mastec is engaged in construction and engineering. The division of Mastec involved herein, the Advanced Technology Division, or the AT Division, is solely involved in performing work for DirecTV, installing their products, dishes, receivers and other items, in customers' homes and businesses. The Respondent maintained four facilities in the South Florida area involved herein: Boca Raton, Ft. Pierce, Ft. Lauderdale and West Palm Beach, which facility and its employees were transferred to Riviera Beach in about November or December 2010, and those facilities were at the hearing, and will be in this Decision, referred to interchangeably as either West Palm Beach or Riviera Beach, although by December 2010, the Respondent no longer operated out of the West Palm Beach (Westgate) facility. In March 2008, the Board certified the Union as the collective bargaining representative for the following employees of the Respondent employed at its West Palm Beach facility :

All full-time and regular part-time service technicians, apprentice technicians, lead technicians and warehouse technicians, excluding all other employees, professional employees, office clerical employees, managers, guards and supervisors as defined in the Act.

That was the only of the four locations involved herein where the technicians were represented by a union. At the conclusion of a decertification election, the Board, on December 1, 2009, again certified the Union as the collective bargaining representative of these employees at the West Palm Beach facility. The Respondent and the Union have been engaged in collective bargaining negotiations since about 2008. The parties agreed that they would first negotiate the non-economic issues and when those were agreed upon, they would proceed to the economic issues. Unfortunately, they never got past the non-economic issues and, obviously, never agreed upon a collective bargaining agreement.

As stated, *supra*, as of January, the Respondent maintained four area facilities: Ft. Lauderdale and Ft. Pierce, not prominently involved herein, and West Palm Beach/Riviera Beach and Boca Raton, herein, at times, called Boca. The event precipitating many of the unfair labor practice allegations herein is the closing of the Boca facility, a non-union facility, in mid-February and the voluntary<sup>2</sup> transfer of most of its employees to the Riviera Beach facility, whose employees were represented by the Union. A month later, the Respondent was given a

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<sup>2</sup> I say "voluntary" because, although the employees could have transferred to any of Respondent's facilities in the area, a large majority chose the Riviera Beach facility.

petition signed by about eighty percent of the Riviera Beach employees and, on that basis, withdrew recognition of the Union. All of this resulted in the numerous Section 8(a)(1)(3) and (5) allegations contained in the Complaint herein.

5           There was testimony from a number of witnesses regarding a discussion with the Boca technicians about an increase in their pay and benefits. Employee Joseph Josepa testified about such a discussion, but he was clearly confused about the date of the meeting. He testified that it took place in February, April or May.<sup>3</sup> Muoio, Villa, the Boca supervisors, and about  
10           twenty two employees attended the meeting. Villa said that the company had some good benefits for the employees: effective May 1, they would be given the DirecTV Premium Package as well as a Bingo package.<sup>4</sup> In addition, their pay rate would be increased by three or four  
15           dollars. Gabriel Reyes, who was employed by the Respondent as a technician at Boca at the time, testified that at this meeting, which he places in about February, Villa told the technicians that they would be given the DirecTV Premium Package, the Bingo Bonus Game, and an  
20           increase of about two dollars per service call. The DirecTV Premium Package would be effective in about May, and the Bingo and increased pay were effective immediately. Villa testified that in December 2010 he met with the technicians at all the offices that he was responsible for to tell them of the numerous changes that would be taking effect regarding compensation, titles, and the metrics that are used to measure employees' productivity. These  
25           changes were to take effect on January 1. Neither the DirecTV Premium Package nor Safety Bingo was mentioned at these meetings, and there was no such meeting at the West Palm Beach facility.

          By Memo to its AT employees dated February 11, entitled: "Great News! HSP  
30           Programming Enhancements," Respondent notified them that effective March 1, they would receive the DirecTV Premium Package containing all the premium channels. The memo ends by stating: "It's just another way to say thank you for all that you do every day to provide the highest quality service to our customers and to DirecTV and for being a valued member of the MasTec AT team." At the bottom of the page, with an asterisk, it states: "Note. These benefit  
35           changes are not available to sites represented by a union."

### **B. Closing the Boca Raton Facility**

          On February 15, Respondent's representatives met with the technicians employed at the  
35           Boca facility and notified them that the AT Division would no longer be operating at that facility, and that they could transfer to another of its facilities, but they had to make a decision within the following seventy two hours. Although the closing of the Boca facility is not alleged as a violation of the Act, it is alleged that the Respondent, by Muoio and Villa, violated Section 8(a)(1) of the Act by threatening employees with a reduction in pay and benefits because of Union  
40           representation, and violated Section 8(a)(1)(3)&(5) of the Act by transferring employees from Boca to Riviera Beach and by reducing the pay and benefits of the employees who transferred, and by doing so without bargaining with the Union. Respondent defends that any statements

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45           <sup>3</sup> It is highly unlikely that this conversation took place at any of those times as the Respondent closed the Boca Raton facility in February. In the affidavit that he gave to the Board he placed the time of this meeting as six to eight weeks prior to the move from Boca to Riviera Beach, which would place the meeting in December 2010.

50           <sup>4</sup> The Bingo benefit was a regular Bingo game, where employees were given cards and when the numbers were chosen randomly, they could win money, with no employee contribution. The DirecTV Premium Package, also without cost to the employees, included HBO, Showtime and other premium channels.

made to the employees at this meeting was not a threat, but was a statement of fact that, if they transferred to West Palm Beach, the benefits at that facility were governed by negotiations with the Union. Josepa testified that all the Boca technicians were present at this meeting, as well as Muoio, Villa, Anderson and the supervisors. Muoio said that there was a problem at Boca because two Mastec companies were sharing the facility and there was not enough room for both. The AT Division employees would be leaving the facility, and they could transfer to Ft. Pierce, Ft. Lauderdale or the West Palm Beach facility, but they would have to make a decision in the next seventy two hours. Muoio then told the technicians that if they transferred to Ft. Pierce or Ft. Lauderdale, their pay and benefits would remain the same, including the Safety Bingo package<sup>5</sup> and the DirecTV premium channels, "...but if you would move to West Palm, the metrics<sup>6</sup> will stay...actually go down. So it will go to an old metrics, and our pay and benefits will not be there." He told them what they would be earning at West Palm Beach if they were a lead mechanic, a regular tech, or an apprentice. Somebody asked what employees could do to maintain their benefits if they moved to West Palm Beach, and Muoio said that he didn't know because West Palm Beach was a unionized facility.

Reyes testified that at this meeting Muoio said that it was not beneficial for the company to keep Boca open, and that the employees could transfer to Ft. Lauderdale, Ft. Pierce or the Riviera Beach location, but they had to choose within the next seventy two hours. He told them that if they transferred to the Riviera Beach office, they would not have the same pay or benefits that they presently have, because "it is a union location." An employee asked what they had to do to keep their existing benefits, and Villa motioned with his hands in a rotating manner and said, "Well, better things are coming." In answer to a question about pay and benefits, Muoio said that they would remain the same as they had for the prior three years, "because it's a union location." Of the twenty two technicians employed at Boca, about sixteen transferred to Riviera Beach.

The Boca technicians were also given a memorandum dated February 15, notifying them that effective February 19, Mastec's AT Division planned to discontinue its operations at that site and that they would be permitted to transfer to any location within the South Region. In answer to a question whether there would be anything different about working at the other locations, the memorandum stated that there would be little if any change for those transferring to the Ft. Lauderdale or Ft. Pierce location, but : "Technicians employed at the West Palm Beach location are represented by a union, so technicians transferring to that site will be subject to different policies and procedures. For example, there are Scorecard, Compensation-Rate Card and other policy and program differences in the West Palm Beach location. These will be fully explained for anyone who requests more information."

Villa and Muoio were the speakers for management at the meeting of Boca technicians on February 15. Villa testified that he told the technicians that the AT Division would no longer be operating at the Boca facility, and that they could transfer to Ft. Lauderdale, Ft. Pierce, West Palm Beach, or any other facility operated by the Respondent, but they had to make a decision within seventy two hours because February 19 was to be their effective day at their new location. He and Muoio told the technicians that if they transferred to Ft. Lauderdale or Ft.

<sup>5</sup> The Safety Bingo program was effective in Respondent's facilities, with the exception of West Palm Beach, on February 7. Effective March 1, all the technicians received the HBO Premium Package, except for the West Palm Beach technicians, who received only the HBO Basic Package.

<sup>6</sup> Metrics is how the Respondent measured the technician's production, based upon the number of jobs that they performed with deductions for callbacks.

Pierce, their pay and benefits would remain the same as they were at Boca. However, if they transferred to West Palm Beach, there would be "multiple differences" in compensation as well as job titles. They would have the HBO Basic Package rather than the Premium Package, and would not have Safety Bingo. They would have a different workweek but, unlike Boca, they would not be charged forty dollars weekly if they chose to commute to/from home in the company van. Approximately eighteen of the twenty two Boca technicians elected to commute in the Respondent's van. When asked if he waved his hands and told the employees that better things are coming, at this meeting, he first testified that he did not remember doing and saying that, then he testified that he did not do it.

Muoio testified that he was "the facilitator" in moving the AT Division technicians out of the Boca facility. He testified that the space at Boca was overcrowded with a poor layout, as well as problems with parking. When he spoke to John Brewer, vice president of another division of Mastec that shared the Boca facility with Respondent about whether Brewer's division would be interested in taking over their space if they left, Brewer told him that "...they wanted it as fast as we could give it to them." He also had discussions and correspondence with the Respondent's vice president and controller who indicated that the Respondent could save approximately \$160,000 by moving from the facility. He, together with Villa, spoke to the Boca technicians on February 15, told them that the AT Division would no longer be located in that facility, and they could transfer to Ft. Lauderdale, Ft. Pierce or Riviera Beach, or to any other facility operated by the Respondent. He testified that "union considerations" played no role in the decision to close Boca.

Anderson testified that at this February 15 meeting at the Boca facility, Muoio and Villa told the technicians that for financial reasons, they were leaving the facility and the employees could transfer to Ft. Lauderdale, Ft. Pierce or the West Palm Beach facility, and they had until Friday, February 18, to make the decision. They were told that as the West Palm Beach facility "was represented by a union...they would have to follow the pay rates and the scorecards<sup>7</sup> of that facility." The employees were told that there was a five day workweek at West Palm Beach; at Boca, they were allowed to work six days, and that there was a difference in the pay for each work order. He testified:

We let any employee know that if they wanted to go to West Palm, we would review the scorecard and the pay that they would be receiving at that location if they would like to transfer there, but prior to making their decision so they could...be educated before making their decision.

This document, I sat down with each employee that wanted to discuss it and reviewed it with them, letting them know that from January 1<sup>st</sup> until that present date where they would be at in terms of the scorecard in West Palm Beach.

The document that Anderson referred to in his testimony, contained the name of each of the technicians at Boca, and columns for Repeat Service Percentage, when something went wrong on a job that he performed and he had to return to correct it (a bad thing), Return Rate Percentage, where the technician returns to the customer to connect the DirecTV receiver to a phone line or internet service (a good thing), the Total Adjusted Orders, completed work orders,

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<sup>7</sup> Anderson testified : "The scorecard is what we review with the employees. We do it once every four weeks. We sit down with the employees and show them where they currently are on their metrics and let them know where they need to improve on, where they're coming up short..."

and whether the technician would be promoted or demoted.

Brewer is employed as Vice President of MasTec Network Services, a different division of the Respondent. His division leased the Boca facility, and subleased part of the space to the Respondent, which then paid 55% of the rent. He testified that by late 2010, this space was "extremely congested...a just barely livable situation at best," with "just no room to operate." In addition, until the technician's trucks left in the morning there was no parking space available at the facility. He spoke to Muoio and representatives of Mastec, saying that if the Respondent didn't vacate the facility, his division would. The Respondent left in February, and his division remained there until the lease expired on December 31.

In addition to these speeches by Muoio and Villa at the Boca facility regarding closing the facility, it is also alleged that the Respondent, by Dwight McKenzie, an alleged agent of the Respondent within the meaning of Section 2(13) of the Act (he is not also alleged to be a supervisor), on about February 16 or 17, by telephone, threatened employees that their pay would be reduced because of Union representation, solicited employees to eliminate the Union as their bargaining representative and impliedly promised improved pay and benefits if they did so, and interrogated employees about their Union activities, and those of their fellow employees. Josepa testified that within seventy two hours of the meeting at the Boca facility, he had a telephone conversation with McKenzie, whom he identified as a site manager at West Palm Beach, whereas the Complaint alleges that at the time he was regional operations trainer for the Respondent. Josepa testified that he doesn't recollect whether he called McKenzie or McKenzie called him, "because...he was a site manager at the West Palm Beach facility, so I actually wanted to ask him what the Union was about." He testified that in this conversation McKenzie said: "...the Union basically is an organization where they fight for the rights of the employee and making sure that the employer doesn't abuse the employee...that's all that he would basically give me.. And...he said if you all can just come together...and vote them out, that you don't have to deal with the Union." After being shown the affidavit that he gave to the Board on December 15, he added that McKenzie also said, "That if we go to the West Palm Beach facility that our pay and benefits would be reduced and we will not have any of our benefits because the office is being represented by a union." His affidavit states that McKenzie told him that the employees "...could get together and get rid of the Union," but he did not say why they should do so.

Reyes testified that within seventy two hours of the meeting at Boca, he had a telephone conversation with McKenzie, who told him that it was probably best for him to go to West Palm Beach, because it is closer to where he lived. Reyes said that it wasn't right for the company to make the transfer, and McKenzie said, "the only thing is that there is a union there." He said that there were some "new Spanish guys" at West Palm Beach, "and it's about 50/50, that they're leaning towards not having the Union there. And if we came in there...we would pretty much get rid of the Union." McKenzie also said that they would make more money if they got rid of the Union, and would be better off without it. McKenzie, who has been a trainer for the Respondent since late 2010, testified that nobody from management of the Respondent asked him to call the technicians to tell them to get rid of the Union, nor did he ever do so.

It is alleged that the Respondent is responsible for these alleged statements by McKenzie because he is an agent of Respondent under Section 2(13) of the Act. In the latter part of 2010, McKenzie transferred at his own request from being a site manager to being a trainer for the Respondent, and his yearly salary remained the same- \$53,500. Villa testified that in about October or November 2010, shortly before the technicians moved from the Respondent's Westgate/West Palm Beach facility to Riviera Beach, he conducted a meeting of the technicians at the facility, and told them that McKenzie was transferring from being a site

manager at the facility, to being a trainer, and that Chris Weimert would take over as the site manager. Mark Hall, who has been employed by the Respondent as a technician at West Palm Beach since 2005, testified that the technicians regularly receive training about new products, procedures or rules from the Respondent's trainers. Hall was asked by counsel for the Charging Party:

Q Well, do you perceive him to be a person who speaks for management of the Company?

A Yes.

Just as the title indicates, he and the other trainers train, instruct and assist the Respondent's employees whenever necessary. They preside over a five week training course for the technicians and do whatever recertifications are required for employees whose certifications have expired. In addition, they teach the technicians about new products that were introduced by DirecTV and conduct driver aware courses and train the employees on health and safety issues. When technicians in the field need assistance with a technical issue, they will, at times, call the trainers for assistance and they will initially try to troubleshoot the situation over the phone. Hall testified that during training, the technicians are advised that the consequences of failing to follow company rules are verbal counseling, written counseling, and termination. McKenzie was asked by counsel for the Respondent if, during new hire training, he explains the consequences of not following the policies and procedures in the Respondent's handbook. He testified: "The HR takes care of that part for the most part."

### **C. The Move to West Palm Beach**

Hall testified that on about February 15, Villa came to the West Palm Beach facility and met with the technicians, and told them that the Boca facility was closing, and the technicians from that office would be coming to West Palm Beach beginning the following week: "He said that they wouldn't be getting the benefits that they were getting at the Boca location. They would be coming down to the benefits that we get at the West Palm Beach location." Some of these lost benefits were bonuses, pay cuts, the HBO Premium Package and Safety Bingo. When asked if Villa explained why they would lose these benefits upon going to Riviera Beach, he testified: "He was saying due to the unique situation that was going on at the Riviera Beach location, those guys...wouldn't be getting the benefits. And if we were to get the benefits, it would have to be negotiated."

There were approximately thirty technicians employed at West Palm Beach prior to February 19; subsequent to the closing at Boca, this number increased to approximately forty six. James Kelleher, assistant business manager/organizer for the Union, testified that in mid-February, he was told by bargaining unit employees that some of the Boca technicians had been transferred to West Palm Beach. He had never been informed by any management official or supervisor of the Respondent of this transfer, nor was he informed about the changes to the wages and benefits of the Boca technicians when they transferred to West Palm Beach.

The Respondent conducted meetings of the technicians at the West Palm Beach facility after the Boca technicians transferred there on February 22, 23 and 24. Charles Bingham, who has been employed by the Respondent since 2004, and who has assisted the Union in negotiations since 2008, testified that the meeting he attended was also attended by Villa, Anderson, supervisors, and approximately twenty employees. He testified that at this meeting Villa told the technicians that when they replaced a receiver at other locations they were paid about four dollars, they would not get that at West Palm Beach, nor would they be receiving the

HBO Premium Package. One of the technicians asked what they had to do so they wouldn't be getting a pay cut, and Villa responded, "You guys know what to do." Bingham then asked, "What do we need to do? Throw the Union out?" He testified that Villa then said, "Well guys, I can't say that, but Charles said it best. Now you know what to do." Villa testified that an employee at one of these meetings asked how they could change their compensation, and Villa reminded the employees that at the Boca meeting the prior week he told them that all terms and conditions of employment at West Palm Beach had to be negotiated with the Union. At that point, Bingham said, "So, what you're saying is that we just need to vote the Union out so we can get paid more" and Villa responded: "I never said that; you're saying that." He testified that he never said, "Charles said it best." Anderson testified that Villa spoke for the company at these meetings and welcomed the former Boca employees and told them that they would be receiving the same pay and benefits as the other West Palm Beach employees. One of the technicians asked about the pay rates and, while he was answering, Bingham interrupted him and said that they had closed Boca to get rid of the Union, and after the Union was gone, they would reopen the Boca office. When Villa tried to explain compensation, Bingham said, "So, what you're saying is if we vote the Union out, we're going to get paid more money?" Villa responded, "I didn't say that, you said it." He testified that Villa never said: "Charles said it best."

Joshua Corona, who has been employed as a technician at the West Palm Beach facility for five years, testified that he attended the meeting at the facility where Villa spoke and welcomed the technicians from the Boca facility to West Palm Beach. During this meeting Bingham said to Villa, "What you're saying is, if we want more money, we have to vote the Union out?" Villa replied by saying something like: "You said that, not me." Robert Dumas, who was employed as a technician by the Respondent at West Palm Beach, testified that he attended the meeting after the technicians transferred from Boca to the West Palm Beach facility where Villa said that the Boca technicians would now be working under the rules and working conditions at the West Palm Beach facility. Bingham then said that if the employees were to get rid of the Union, "...there would be a different situation...different increases or whatever..." and Villa responded, "I never said that, you said that." Corona and Dumas each testified that Villa did not respond further to what Bingham said.

#### **D. Withdrawal of Recognition**

Anderson testified that in early March, employee James Carter gave him a petition that was signed by about eighty percent of the employees to decertify the Union at West Palm Beach. Carter told him that he had acquired the signatures from the employees and that they wanted to decertify the Union and "from that point they no longer wanted to be represented by IBEW." Shortly thereafter, a meeting was held at West Palm Beach attended by about ten to twelve technicians, Villa and Anderson. Villa distributed a letter to the employees saying that 80% of the employees did not want the Union and therefore the employees at the facility were no longer represented by the Union, but it would take some time before their benefits started improving. Reyes testified that Villa distributed a letter to the employees and said, as did the letter, that 80% of the employees indicated that they no longer wished to be represented by the Union, and therefore the company no longer recognized the Union as the representative of the employees at the facility. Josepa testified that a petition was being circulated at the facility "...to sign if we wanted to get rid of the Union." Hall testified that one of the technicians at the facility, Carter, had been soliciting employees at the parking lot at the facility, to sign a petition to decertify the Union. A meeting was held on March 12 with Villa and the West Palm Beach technicians, but Hall arrived late, after the meeting concluded. He met Villa coming out of the meeting and Villa gave him the March 12 letter from the Respondent to the West Palm Beach technicians. After he read the letter Villa told him that with the Union out of the picture they could give the employees better pay, bonuses the HBO Premium Package, and the Bingo



game, and Hall said that would be a good thing.

The March 12 letter, from Muoio and Villa, states:

5 We would like to congratulate you on your decision to be union free. With more than 81% of this location's technicians signing a petition to no longer be represented by a union, your voice was clearly heard. That strong message drove the change we are announcing today. Effective, Friday, March 11, West Palm Beach is a non-union site.

10 You may be wondering what you should expect now. Perhaps you are even curious about when some positive changes can be implemented in West Palm Beach. **Answer: we will be able to provide more information and move forward when it is clear that the union properly recognizes your decision to be union free.** Our goal is to create a positive and proactive work environment where we can directly address job-related

15 issues or concerns and make MasTec the best place to work possible. You have taken the first big step necessary for us to work collaboratively going forward- a chance we know you will find beneficial

20 We will be sharing more details with you as soon as they are available, so stay tuned. Our thanks for the excellent service you deliver to our customers every day, and congratulations on a noteworthy accomplishment.

By letter dated March 14, Respondent's attorney wrote to the Union:

25 I am confirming the substance of our conversation this morning. Approximately 80% of the technicians in West Palm have provided us with documentation to the effect that they no longer wish to have your union be their collective bargaining representative.

30 Accordingly, the company no longer may engage in collective bargaining with your union, and hereby withdraws recognition of the union's status as representative of the technicians in West Palm.

By letter to the technicians dated March 22, from Muoio and Villa, Respondent stated:

35 After more than 80% of you served notice through a signed petition that you no longer want the union to represent you, a number of you inquired about implementing changes in West Palm Beach consistent with other offices in MasTec. We have advised you that as soon as the union properly recognizes your decision to be union free, there is nothing that prevents those changes from happening.

40 We are writing here to let you know that the union has effectively rejected the petition you signed and has filed an unfair labor practice charge, which claims that your petition somehow does not really represent what you want...Essentially, the union is saying that what you want doesn't count. The union's position is that the only thing that matters is what the union wants, and the union wants to keep you bound up with the union.

45 We will fight the union's baseless charges, so that we can honor your wishes to be union free. However, please understand that we must now wait for this legal matter to be resolved, affirming your decision to be union free. We know this is important to you in many ways, and we are committed to keeping you informed.

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Since March 12, the Respondent has refused to recognize the Union as the bargaining

representative of the West Palm Beach/Riviera Beach technicians and there has, obviously, been no bargaining between the parties.

There was a meeting at West Palm Beach at which the Respondent presented a Power Point presentation to the technicians. It is unclear exactly when this Power Point meeting took place. Hall testified that it took place about a week after the Respondent withdrew recognition from the Union, and they were told that the purpose of the meeting was to educate them about the situation between the Respondent and the Union. Josepa testified that this meeting took place about two weeks after the announcement of the withdrawal of recognition. Villa testified only that it took place after they received the decertification petition. The opening visual stated that the purpose was to keep the employees informed about the Union, "which used to represent this office." The presentation stated that the Union cancelled bargaining sessions, delayed submitting proposals to the table, did not accomplish anything for the employees, and then compared improvements in wages, benefits and working conditions at its other (non-union) facilities, with what the West Palm Beach employees were receiving.

There is no allegation that any portion of the Power Point presentation was unlawful. Rather, it is alleged that statements that Villa made at this meeting created the impression that the employees' Union activities were under surveillance and impliedly promised improvements in pay and benefits if the employees withdrew their support for the Union. Josepa testified that Anderson spoke at this meeting and said that "...the Union is the one that's not allowing us to...travel out of State, which was a benefit. Having DirecTV premium package---that they didn't want that because they didn't want to negotiate that. Our pay and benefits is not negotiated, so the Union just prevented all of us to actually have all of the benefits." Villa then said that "...if we do get to negotiate, that doesn't mean that we will get all the pay and benefits as before..." Villa also said that they knew that there was a Union meeting being held that evening. Reyes testified that Villa opened the meeting by saying, "We understand that there is going to be a Union meeting, and we want you to know that the Union has done nothing for you." Anderson then told the employees about what the technicians at the other locations were receiving, "and this location was getting nothing. I remember the locations getting DirecTV, the packages, the metrics numbers, the bonuses...the other locations are getting all the benefits and pay increases except this location." Hall testified that there was a Union meeting scheduled for about two days after this meeting, and at this meeting Villa said, "We know there's a meeting coming up...and after you educate yourselves, make sure you ask the right questions." Anderson then spoke and gave the Power Point presentation that he said was to educate them on the situation between the Respondent and the Union. Villa testified that there were three Power Point meetings with the West Palm Beach technicians after the Respondent received the decertification petition signed by the employees. During these meetings, he did not say that he knew that there was going to be a Union meeting that night or the following night. Rather, during one of the presentations, one of the employees said that there was a Union meeting that night or the following night.

In addition to defending that Villa did not make the statement allegedly creating the impression of surveillance, counsel for the Respondent defends that this allegation is barred by Section 10(b) of the Act. This meeting took place in mid to late March 2011. The original unfair labor practice charge, filed on March 16 alleging a violation of Section 8(a)(1)&(5) of the Act, states that the Respondent unlawfully withdrew recognition of the Union, announced that it was "union free" and impliedly threatened employees who objected to the withdrawal of recognition. On May 2, the Union filed an Amended Charge, repeating the earlier allegations and adding that the Respondent encouraged employees to vote to decertify the Union and encouraged employees to get rid of the Union. On August 19, the Union filed another unfair labor practice charge alleging that by transferring employees from Boca to West Palm Beach and "unilaterally

ceasing benefits that were previously available to all employees who worked in the West Palm Beach facility” [sic] and by failing to notify the Union that it was giving certain new fringe benefits to its non-union employees, the Respondent violated Section 8(a)(1)(3)&(5) of the Act. The Second Amended (the final charge herein), filed on January 6, 2012, over nine months after the

5 Power Point meeting, alleges a violation of Section 8(a)(1)&(5) of the Act by withdrawing recognition of the Union on about March 14, stating that it was “union free” and promising employees benefits if they got rid of the Union, solicited employees to decertify the Union, threatened employees with the loss of wages and benefits because of the Union, and “created the impression of surveillance of its employees union activities.” [emphasis added]

10 Josepa testified that in about April, upon receiving his pay check he became angry that he was earning so little, and he yelled, “What do I have to do to make some money around here.” Anderson asked to see his pay stub and said that there were a lot of deductions and he told Josepa to ask his supervisor if he could earn extra money by picking up extra work, and

15 Anderson also said, “You can vote the Union out.” Reyes testified that a couple of weeks after the Power Point meeting, he had a heated argument with his supervisor. On the following day, he apologized to Anderson and said that he had to start earning more money. Anderson told him that the Respondent was working on some new accounts in the Northeast, “...and that if we got rid of the Union, we’d be able to make more money.” Anderson testified that he never

20 promised any employee increased pay and work opportunities for abandoning their support for the Union.

### III. Analysis

25 It is alleged that on about February 16 or 17 McKenzie threatened employees that their pay would be reduced because the Union represented the employees at West Palm Beach, solicited them to decertify the Union and impliedly promised them improved pay and benefits if they did so, and interrogated them about their Union activities and sympathies as well as those of their fellow employees. In order to establish these violations, Counsel for the General

30 Counsel has to establish by credible evidence that McKenzie did this, and that he is an agent of the Respondent within the meaning of Section 2(13) of the Act. Josepa testified that after McKenzie told him that the Union fights to protect the employees, he said that if the employees “...just come together...and vote them out, you don’t have to deal with the Union.” He also told Josepa that if he transferred he would lose benefits because that location is represented by a union. Reyes testified that McKenzie told him that if enough new employees transferred to West

35 Palm Beach, they could “...pretty much get rid of the Union” and that they would be better off, and would make more money, without the Union. These conversations allegedly took place in telephone calls with McKenzie, who testified that nobody from management told him to call the technicians to tell them to get rid of the Union and he never called employees to tell them that. I

40 find the testimony of Josepa and Reyes more persuasive and credible than McKenzie and find that these statements were made by him.

It is alleged that McKenzie was a trainer for the Respondent and an agent within the meaning of Section 2(13) of the Act. Up until the end of 2010, had been a site manager for the

45 Respondent, but at the time of these incidents, he no longer had that position and he is alleged to be an agent, not a supervisor within the meaning of the Act. The Board has consistently applied common law principles of agency. In *SAIA Motor Freight, Inc.*, 334 NLRB 979 (2001), the Board stated: “Under the doctrine of apparent authority, an agency relationship is established where a principal’s manifestations to a third party supply a reasonable basis for the

50 third party to believe that the principal has authorized the alleged agent to perform the acts in question.” Stated another way, the issue is whether “...employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for

management.” *Albertsons, Inc.*, 344 NLRB 1172 (2005). *California Gas Transport, Inc.*, 347 NLRB 1314, 1317 (2006) stated: “Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief.” The party asserting agency status bears the burden of

5 establishing the relationship, and “the party who has the burden to prove agency must establish an agency relationship with regard to the specific conduct that is alleged to be unlawful.” *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). Counsel for the General Counsel, in her brief, argues that as McKenzie had been a site manager, and a Section 2(11) supervisor two to three months earlier, the employees would reasonably believe that he was speaking on behalf of

10 management in February, when he spoke to Josepa and Reyes. However, I credit Villa’s testimony that in October or November 2010, he told the technicians that McKenzie was becoming a trainer, and that Weimert would be replacing him as site manager. Counsel also cites *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998), which found that the three alleged agents:

15 ...attend daily production meetings with top management, from which they returned to communicate management’s production priorities...each department head is the “link between employees and upper management.” The employees look to them to communicate instructions from management, sign off on their vacation requests, and

20 otherwise implement company policies on the production floor. The employees could reasonably believe, therefore, that when the three department heads made statements concerning actions that the Respondent’s management was likely to take if a union were brought in, they were transmitting management’s views.

25 I find that Counsel for the General Counsel has not carried her burden of establishing that McKenzie was a Section 2(13) agent of the Respondent when he spoke to Josepa and Reyes. Although McKenzie had been a site manager months earlier, at the time of these telephone conversations he was a trainer who, trained and instructed the technicians on how to perform their job properly,<sup>8</sup> and there is no evidence that Josepa and Reyes could reasonably believe

30 that when McKenzie was speaking to them, he was speaking on behalf of management. Further, the facts herein are distinguishable from *Hausner*, supra, where the alleged agents were department heads who were seen as the individuals who transmitted management’s orders to the employees. In the situation herein, McKenzie trained the employees on the Respondent’s procedures and DirecTV’s products; he was not viewed as a link between

35 management and the employees. I therefore recommend that these allegations be dismissed.

It is next alleged that on about February 14 or 15, Muoio and Villa, at a meeting of employees at the Boca facility, told the technicians that the facility was closing and that they could transfer to another of Respondent’s facilities, threatened employees with a reduction of

40 pay and a withholding of benefits because of union representation, in violation of Section 8(a)(1) of the Act.

Josepa and Reyes, as well as Villa, Muoio and Anderson, testified about this meeting at Boca on February 15. Josepa’s testimony about this meeting was somewhat confused. He

45 testified that it took place in February, April or May, and this is clearly wrong. First, I credit Villa that this meeting took place on February 15, which comports with the fact that the technicians were given seventy two hours to decide which facility they wanted to transfer to, effective

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50 <sup>8</sup> In *Jules V. Lane, D.D.S., P.C.*, 262 NLRB 118, 119 (1982), the Board stated that it considers the position and duties of the employee in addition to the context in which the behavior occurred.

February 19. Josepa's testimony about what Villa and Muoio said is also confusing. He testified that they said that for the employees transferring to Ft. Lauderdale or Ft. Pierce, their benefits would remain the same, but for those who transferred to West Palm Beach, "...the metrics will stay...actually go down. So it will go on to an old metrics and our pay and benefits will not be there." Muoio also told them what the different job classifications would be earning at West Palm Beach, and when somebody asked what employees could do to maintain their benefits after moving to West Palm Beach, Muoio said that he didn't know, since it was a unionized facility. Reyes testified that Muoio told them that if they transferred to the Riviera Beach facility they would not have the same pay and benefits that they presently have because "it is a union facility." When an employee asked Villa what they had to do to maintain their benefits, he motioned with his hands in a rotating manner and said, "Well, better things are coming." The Boca employees were also given a Memorandum dated February 15 notifying them that the Respondent was discontinuing its operation at Boca, and that they could transfer to any location in the South Region. The Memorandum said that there would be little if any change if they transferred to Ft. Lauderdale or Ft. Pierce, but because the employees at West Palm Beach were represented by a union, those employees transferring there "...will be subject to different policies and procedures...These will be fully explained for anyone who requests more information."

Villa testified that he told the Boca technicians that the AT Division would no longer be operating out of the Boca facility and that they could transfer to any facility being operated by the Respondent, including Ft. Pierce, Ft. Lauderdale and West Palm Beach, but they had to decide within seventy two hours. He and Muoio told them that there would be no change in their pay and benefits if they transferred to Ft. Pierce or Ft. Lauderdale, but there would be "multiple difference" in compensation and job titles if they transferred to West Palm Beach: they would have the Basic Package, rather than the Premium Package, and they would not have Safety Bingo. There would be a different workweek, but, unlike Boca, they would not have to pay to commute home in their work van. He denied Reyes' testimony that he waved his hands and said better things are coming. Muoio testified that he also told the employees that the AT Division would no longer be operating in Boca, but that they could transfer to any facility being operated by the Respondent. Anderson testified that at this meeting the employees were told that the West Palm Beach facility was represented by a union and that if they transferred there they would have to follow the pay and working conditions at that facility. He told the employees that if they were considering transferring to West Palm Beach, prior to making that decision, they should meet with him about what their pay and benefits would be at that location, "so that they could...be educated before making their decision," and a number of employees did meet with him about this.

Although I did not find Josepa and Reyes to be incredible, I found the testimony of Villa, Muoio, and Anderson to be more reasonable and believable, and I credit the testimony of Brewer, Villa, Muoio and Anderson about the need to move the AT Division from Boca as well as what was said at this meeting. It is alleged that Villa and Muoio threatened employees with a reduction in pay and benefits because of union representation, in violation of Section 8(a)(1) of the Act. And, it is true, that they did tell the employees that if they transferred to West Palm Beach their pay and benefits would, overall, be reduced; however, that was the truth. In *Viacom Cablevision of Dayton, Inc.*, 267 NLRB 1141 (1983), the employer sent letters to its employees showing that wages were higher at its non-union facilities than at its facilities where its employees were represented by a union. The Board found no violation:

A comparison of wages is not *per se* objectionable; the question is, was there a promise, either express or implied from the surrounding circumstances, that wages would be adjusted if the union were voted out. Here, pursuant to employee requests for

information, the Employer did no more than truthfully inform the employees of wages enjoyed by other employees in other Viacom systems and made statements of historical fact concerning the yearly increases which had been given elsewhere in the past.

5 Further, the employees weren't required to transfer to West Palm Beach; rather, most chose to do so. In addition, Anderson told each of the employees that, if they were considering West Palm Beach, he would sit down with them to show them what their pay and working conditions would be at that location. In other words, considering the circumstances (moving from the Boca facility) they did all that they could to notify the employees of the facts, and how a transfer to  
10 West Palm Beach could affect their pay and benefits, and did so in a lawful manner. No promise was made or implied that if the Union were voted out, wages and benefits would be increased. I therefore find that neither Villa nor Muoio violated Section 8(a)(1) of the Act by anything that they told the Boca technicians at this meeting.

15 It is further alleged that by transferring employees from Boca to "positions in the Unit" at West Palm Beach, by reducing the pay and benefits of the employees who transferred from Boca to West Palm Beach, and by granting pay increases and benefits to its unrepresented employees, including pay and benefit improvements that were promised to the Boca employees before they transferred to unit positions at West Palm Beach, while withholding these benefits  
20 from the Unit employees, the Respondent violated Section 8(a)(1)(3)&(5) of the Act. Counsel for the General Counsel alleges that failing to give the improved benefits to those employee who transferred to West Palm Beach, while giving them to those who were employed at, or transferred to, Ft. Lauderdale or Ft. Pierce, violated Section (a)(1)(3) of the Act, and by transferring the employees to West Palm, and changing their pay and benefits, without  
25 negotiating with the Union about these subjects, violated Section 8(a)(1)(5) of the Act. She states in her brief: "Respondent was not obligated to reduce or otherwise change the wages and benefits of the former Boca Raton employees upon their transfer. It was obligated, however, to negotiate with the Union about any changes in their wages and benefits." While all of this occurred, I fail to see where it violated the Act. True, numerous employees transferred from  
30 Boca to Riviera Beach, effective February 19, but the Respondent did not order them transferred; all of them transferred voluntarily being fully aware of the different wages and benefits at Riviera Beach. It is also true that about two months earlier the Respondent had announced some improved wages and benefits to the employees at Boca, Ft. Lauderdale and Ft. Pierce, but not at West Palm Beach. However, as the employees at Boca, Ft. Lauderdale  
35 and Ft. Pierce were unrepresented, the Respondent was free to grant them these benefits, while, as the Union represented the technicians at West Palm Beach, the Respondent could not grant any benefits to these employees without prior bargaining with the Union. In *McGraw-Edison Company*, 172 NLRB 1604, 1609 (1968), prior to a Board election, the employer reminded employees that it had voluntarily granted benefits to employees in the past and told  
40 employees at some of its facilities not to rush to join the union, but to wait and see what happens at the plant where the election was scheduled. Shortly thereafter, the employer increased hospitalization benefits for the non-union employees, stating that it had not been given to the union employees because they chose to have the union represent them and "we no longer can deal directly with them in matters of this type." In addition, the employer increased  
45 benefits at other nearby non-union facilities. The Trial Examiner, as affirmed by the Board found no Section 8(a)(1)(5) violation:

50 While the timing and manner in which the Company put increased benefits into effect at it unorganized plants served to underline the Company's position that its employees did not need a union to obtain wage increases and other benefits, it does not follow, as the General Counsel contends, that the Company evinced bad faith at the Moberly negotiations by withholding these benefits from the Moberly employees until a contract

could be agreed upon...the Company did not bargain in bad faith by granting benefits to its unorganized employees during the Moberly negotiations and withholding these benefits from the Moberly employees pending consummation of a contract.

5 In addition, in *Langston Companies*, 304 NLRB 1022, 1048 (1991), the employer offered a benefit to its non-union employees that it did not offer to its unionized employees. The judge, as affirmed by the Board, stated: "Respondent, in collective bargaining, is under no obligation to acquaint the Union of working conditions and benefits at its other plants." Further, I note that  
10 had Respondent not reduced the wages and benefits of the Boca employees who transferred to West Palm Beach to those prevailing at that location, it would have provoked considerable animosity among the existing West Palm Beach employees. In addition, Respondent was obligated to bargain with the Union about the terms and conditions of employment of the transferring employees only after they became part of the unit, on February 19 and, as stated by  
15 counsel for the Respondent in his brief, it had no obligation to freeze the compensation for its non-union employees while awaiting the completion of its bargaining with the Union, nor was it obligated to provide the same benefits to its union employees that it granted to its non-union employees. I therefore recommend that these allegations that the Respondent violated Section 8(a)(1)(3)&(5) of the Act be dismissed.

20 It is next alleged that on about February 21 Respondent, by Villa, at the Riviera Beach facility, solicited employees to eliminate the Union as their collective bargaining representative, and promised employees improvements in their pay and benefits if they did so. These allegations relate to the meetings held at the Riviera Beach facility on February 22, 23 and 24, after the Boca technicians transferred there. Employees Bingham, Corona and Dumas testified  
25 about this meeting, as did Villa and Anderson. Bingham testified that Villa told the employees about the difference between the benefits at West Palm Beach and the other facilities and when an employee asked what they had to do to avoid a cut in pay, he responded, "You guys know what to do." Bingham then asked: "What do we have to do, throw the Union out?" and Villa responded, "Well guys, I can't say that, but Charles said it best. Now, you know what to do."  
30 Corona testified that after Bingham said, "What you're saying is, if we want more money, we have to vote the Union out?" Villa said, "You said that not me," nothing more. Dumas also testified that after Bingham interrupted and said that it would be a different situation if they got rid of the Union, Villa responded, "I never said that, you said that" and nothing more. Villa testified that after he reminded the employees that at the meeting in Boca the prior week he told  
35 them that all terms of employment at West Palm Beach had to be negotiated with the Union, Bingham said, "So, what you're saying is we just need to vote the Union out so we can get paid more" and he answered, "I never said that; you're saying that." Anderson also testified that this was Villa's response to Bingham, and that he did not say, "Charles said it best." As stated above, I generally found Villa to be a credible and believable witness, especially here where his  
40 testimony is supported by Corona and Dumas, two credible employee witnesses, and find it highly unlikely that an experienced manager such as he would make the statement that Bingham attributes to him. I therefore find that Villa did not respond to Bingham's statement by saying, "Charles said it best" and finding nothing improper in what he said at these meetings, and I recommend that this allegation be dismissed.

45 It is next alleged that on about March 12, 15, and 16 the Respondent, by Muoio and Villa, at the Riviera Beach facility, distributed and read a memorandum to the employees announcing that they were "union free" and impliedly promised them benefits for abandoning their support of the Union. It is further alleged that Respondent, by Villa, in March or April, also  
50 at the Riviera Beach facility, created the impression among its employees that their union activities were under surveillance by the Respondent, and impliedly promised employees improvements in pay and benefits for withdrawing their support from the Union. Respondent, in

his Answer and brief, defends that this latter violation is barred by Section 10(b) of the Act. The first unfair labor practice charge alleging that the Respondent created the impression that its employees' Union activities were under surveillance and that it impliedly promised benefits to its employees to encourage them to decertify the Union was filed on January 6, 2012, over nine months after the statement was allegedly made. Prior to discussing the merits of this allegation, it is first necessary to determine whether this allegation is "closely related" to the timely filed allegations herein. In *NLRB v. Fant Milling Co.*, 360 U.S. 301, 308-309 (1959), the Supreme Court dealt with the 10(b) issue, stating that "...the Board is not precluded from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." In *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988), the Board stated:

In applying the traditional "closely related" test in this case, we will look at the following factors. First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act... Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object... Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

In *Carney Hospital*, 350 NLRB 627 (2007), the Board discussed the second prong in *Redd-I*, stating that factual relatedness "is not shown simply because two events occurred close in time, during the same organizing campaign or in response to a campaign. Mere chronological coincidence does not warrant the implication that all challenged employer actions are related to one another as part of a planned response to that campaign."

Based upon all three factors discussed in *Redd-I*, I find that the time barred surveillance and promise of benefit allegations contained in Paragraph 12 and 13 of the Complaint are not closely related to the timely filed allegations. The timely allegations include unlawfully withdrawing recognition from the Union and telling the employees that they are a union free operation, encouraging employees to vote to decertify the Union, transferring employees to the unionized location and failing to notify the Union that it was granting increased benefits to non-union employees. The surveillance and the implied promise of benefits allegations, however, are not closely related to the timely filed allegations, other than the fact that Villa was involved in most of these allegations. I therefore recommend that this allegation be dismissed.<sup>9</sup>

By memorandum to its employees dated March 12, the Respondent notified the technicians at West Palm Beach that based upon the signatures of 81% of the unit employees signing the petition to decertify the Union, the facility is now a non-union site. On March 14

<sup>9</sup> Even had I found that the allegations were closely related, I would recommend that this allegation (Paragraph 13(a) of the Complaint) be dismissed, as I credit the testimony of Hall that Villa told them that he understood there was a Union meeting and, after they educate themselves about the facts, they should ask the right questions. I find that the true tenor of the statement was that the employees should question the Union representatives about its denial that it had lost majority status among the employees at West Palm Beach.



Respondent wrote to the Union stating that based upon that petition, they were withdrawing recognition of the Union as the representative of the technicians at West Palm Beach, and will no longer bargain with the Union as the representative of those employees. It is alleged that by withdrawing recognition of the Union as the collective bargaining representative of these

5 employees, the Respondent violated Section 8(a)(1)(5) of the Act, and that by reading the "union free" memorandum to the unit employees, the Respondent violated Section 8(a)(1) of the Act. Briefly stated, as there is no allegation that the decertification petition was "tainted" by any employer involvement, and as I have found no unfair labor practices engaged in by the Respondent prior to withdrawal of recognition, the Respondent did not violate Section 8(a)(1) of

10 the Act by reading and distributing the "union free" memorandum to the unit employees on about March 12. It is further alleged that the Respondent violated Section 8(a)(1)(5) of the Act by withdrawing recognition of the Union as the representative of the Riviera Beach technicians on about March 12. In *Levitz Furniture Company of the Pacific*, 333 NLRB 717 (2001), the Board stated that "an employer may unilaterally withdraw recognition from an incumbent union

15 only where the union has actually lost the support of the majority of the bargaining unit employees." It is the employer's burden to establish the actual loss of majority support at the time of the withdrawal of recognition, *HQM of Bayside, LLC*, 348 NLRB 758, 759 (2006), and I find that the Respondent has sustained that burden. Respondent was presented with a petition signed by over eighty percent of the unit employees stating that they wished to decertify the

20 Union. As stated above, no evidence was adduced to establish that there was any supervisory involvement in this petition, that it was otherwise "tainted", that any of the signatures contained on the petition were improper in any way, or that the Respondent committed any unfair labor practices in furtherance of the petition. In other words, the petition, and the signatures thereon, are presumed valid. Further, no evidence was introduced to establish that the Respondent's

25 reliance upon the petition was improper in any way, and I find that its withdrawal of recognition did not violate Section 8(a)(1)(5) of the Act.

It is finally alleged that Respondent, by Anderson, in about March or April, promised employees increased pay and work opportunities for abandoning their support for the Union.

30 This allegation relates to conversations testified to by Josepa and Reyes that allegedly took place in April, two weeks to a month after the Respondent withdrew recognition of the Union. Anderson denied having these conversations. This presents a difficult credibility issue as neither Josepa, Reyes nor Anderson were incredible witnesses. Although I would generally credit similar testimony from two apparently credible witnesses, the situation herein is different. They

35 testified that Anderson promised that they could make more money if they "vote the union out" or "got rid of the union." However, the Respondent already had withdrawn recognition of the Union almost a month earlier based upon the decertification petition signed by about eighty percent of the unit employees so, the unanswered question is why would he ask them to get rid of the Union, when it was already out of the picture at the facility. I therefore reluctantly credit

40 the testimony of Anderson and recommend that this allegation be dismissed.

### Conclusions of Law

1. The Respondent has been an employer engaged in commerce within the meaning of

45 Section 2(2), (6) and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(1)(3) or (5) of the Act as alleged in the

50 Consolidated Complaint.

On these findings of fact, conclusions of law and based upon the entire record, I hereby issue the following recommended<sup>10</sup>

**ORDER**

It is recommended that the Consolidated Complaint be dismissed in its entirety.

**Dated, Washington, D.C., July 20, 2012**

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**Joel P. Biblowitz**  
**Administrative Law Judge**

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<sup>10</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.